

# ALASKA NATIVE CORPORATIONS FREQUENTLY ASKED QUESTIONS

## DRAFT FOR DISCUSSION PURPOSES

**Summary:** Alaska Native Corporations (ANCs) are unique entities for the purposes of participating in EPA financial assistance programs.<sup>1</sup> EPA has developed this draft Frequently Asked Questions (FAQ) document on how ANCs and others who may be using EPA grant funds for transactions with ANCs or their subsidiaries can comply with requirements in 2 CFR Parts 200 and 1500 and related EPA guidance.

### **Legal and Policy Framework Questions.**

#### 1. Are ANCs eligible to receive direct funding from EPA as grant recipients?

Yes, but only if the Federal statute authorizing the EPA grant program includes ANCs as eligible entities and the policy of the EPA grant program also provides that ANCs are eligible.

For example, EPA has express authority in 42 U.S.C. 9604(k)(1)(H) to award competitive Brownfields funding to ANCs and the Assistance Listing for that program (66.818) identifies ANCs as eligible entities. Similarly, the statute authorizing EPA's Alaska Native Claims Settlement Act Contaminated Land Assistance Agreements Program (EPA's Fiscal Year 2023 Appropriation Act, Public Law 117-328.) also expressly provided that ANCs are eligible for grants and the Assistance Listing for that program (66.965) specifies that ANCs are eligible. ANCs are also eligible for grants under EPA's 33 U.S.C. 4282 Solid Waste Infrastructure for Recycling Grant Program (SWIFR) as "Indian Tribes" because as provided in 33 U.S.C. 4201(3) "[T]he term "Indian Tribe" has the meaning given the term "Indian tribe" in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304) . . .",<sup>2</sup> which expressly includes ANCs in the definition of "Indian tribe". Under ISDEAA, "Indian tribe" is defined as any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village **or regional or village corporation** as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." (emphasis added) In *Yellen v. Confederate Tribes of the Chehalis Reservation*, 594 U.S. \_\_\_, 141 S.Ct. 2434 (2021) the Supreme Court held that ANCs are Indian Tribes for the purposes of the ISDEAA and EPA follows that decision in the SWIFR Program.

On the other hand, ANCs are not eligible to receive grants directly from EPA in grant programs authorized by the Clean Air Act that are available to federally recognized Tribes, including those grant programs established by the Inflation Reduction Act through amendments to the CAA. This is because the CAA provides a statutory definition of "Indian tribe" for all CAA purposes, including CAA grant and regulatory programs, at 42 U.S.C. 7602(r) which provides, "[T]he term

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<sup>1</sup> Throughout these FAQs we will use the term "grants" to refer to both grants and cooperative agreements.

<sup>2</sup> Even though 33 U.S.C. 4282(a)(1) provides that EPA may award SWIFR grants to "States" the definition of "State" in 33 U.S.C. 4201(1) includes "an Indian Tribe".

“Indian tribe” means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is Federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” Although the CAA definition of “Indian tribe” expressly includes Alaska Native Villages (“ANV”) – which are the federally recognized tribal governments in Alaska – it does not, by its terms, refer to ANCs, which are distinct entities.

Q. 2. Can an ANC’s wholly owned subsidiary apply for funds in place of the ANC when ANCs are eligible for direct grants from EPA?

No. Wholly owned subsidiaries of eligible entities such as Alaska Native Corporations that are legally distinct, separately incorporated for-profit firms cannot apply for EPA funds as an Indian tribe in place of the ANC.

Q. 3 Are ANCs eligible to receive subawards even if they are ineligible to receive direct grants from EPA?

Maybe. Please refer to Q. 54 of EPA’s Subaward Frequent Questions (reproduced below) and available at this link: <https://www.epa.gov/grants/epa-subaward-frequent-questions>

Q. A.54. Are the for-profit Alaska Native Corporations eligible to receive subawards under EPA financial assistance programs?

It depends on the policy of the EPA grant program. Alaska Native Corporations (ANCs) are unique entities in that they are state chartered for-profit corporations established pursuant to the Alaska Native Claims Settlement Act of 1971. Nonetheless, ANCs also fall under the definition of Indian tribe in 2 CFR 200.1 and are generally eligible for subawards under the EPA Subaward Policy.<sup>3</sup> Profit is not allowable under an EPA funded subaward. EPA has determined that ANCs may, depending on the policy of the EPA grant program, receive non-competitive subawards as long as the terms of the subaward provide that the ANC may only receive reimbursement for their direct and indirect costs. Parties who are interested in determining whether ANCs are eligible for subawards (or direct EPA funding) should contact the EPA point of contact identified in the Notice of Funding Opportunity for competitive programs, the EPA point of contact in program guidance for non-competitive programs, or the EPA project officers for assistance agreements that have already been awarded.

(Footnote added).

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<sup>3</sup> The Subaward Policy provides in section 7.0(a) “[G]enerally, unless prohibited or limited by statute, a non-Federal entity or individual is eligible to receive a subaward even if it is not eligible to receive an assistance agreement from EPA directly as long as the subaward is consistent with applicable regulations, policies, and EPA guidance.”

Section 7.0(c) of the Subaward Policy provides that “[F]or-profit organizations and individual consultants, with very few exceptions, are contractors rather than subrecipients under the standards in 2 CFR 200.331 and EPA’s guidance; they are typically ineligible for subawards from pass-through entities.” ANCs, however, are unique entities in that they are state-chartered for-profit corporations established pursuant to the Alaska Native Claims Settlement Act of 1971. Since, under the EPA Subaward Policy, which uses the 2 CFR 200.1 definition of Indian tribe, ANCs are also considered Indian tribes, allowing ANCs to be eligible for subawards in that capacity would be appropriate and consistent with the regulation.

#### Q. 4 How can ANCs participate in EPA’s Community Change Grant Program (CCGP)?

Under the CCGP, ANCs may be Collaborating Entities that receive competitive or non-competitive subawards, or they may compete for procurement contracts, depending on the nature of the transaction. Please read this response carefully to assure such collaboration would meet CCGP Notice of Funding Opportunity (NOFO) requirements. For purposes of clarity, please be aware that ANCs are not Community Based Non-Profit Organizations (CBO) under the CCGP. As indicated in Section III.A of the NOFO, this is because ANCs are for-profit organizations. Further, as explained in Section III.A of the NOFO, ANCs are not eligible to enter Statutory Partnerships with CBOs as “Indian tribe.” This is based on the definition of “Indian tribe” in section 302(r) of the Clean Air Act, which does not include ANCs. See also Appendix H of the NOFO. The coverage on Collaborating Entities in Section III.B of the NOFO, however, notes that “Collaborating Entities may include Statutory Partners (CBOs, Federally recognized Tribes, local governments, and institutions of higher education) and entities that cannot legally be Statutory Partners (e.g., states, territorial governments, and international organizations). For-profit firms and individual consultants or other commercial service providers cannot be Collaborating Entities.”

While ANCs do not meet the definition of Indian tribe under section 302(r) of the Clean Air Act, ANCs are considered Indian Tribes for the purposes of 2 CFR Part 200 and the EPA Subaward Policy, making them eligible to receive subawards. That said, to receive a subaward (competitive or non-competitive), ANCs must agree not to profit from the receipt of the subaward. Under CCGP NOFO, EPA has determined that ANCs are eligible for CCGP subawards.

ANCs may receive subawards from funding available in the Alaska Targeted Investment Area of the CCGP NOFO if the terms of the subaward provide that the ANC only receive reimbursement of their direct and indirect costs. Finally, ANCs may profit from EPA-funded procurement contracts if the transaction complies with the competitive procurement requirements in 2 CFR Part 200, including restrictions on personal conflicts of interest, as interpreted in the Best Practice Guide for Procuring Services, Supplies, and Equipment Under EPA Assistance Agreements (<https://www.epa.gov/grants/best-practice-guide-procuring-services-supplies-and-equipment-under-epa-assistance>). Note also that ANCs, like all businesses in disadvantaged areas, may receive participant support cost subsidies to enable them to purchase low-emission equipment or similar devices that reduce pollution.

Q. 5. If an ANC receives a direct grant from EPA or a subaward from an ANV or other recipient what grant regulations apply to the ANC's expenditure of EPA funds?

The same rules that apply to any Indian tribe that receives a grant or subaward. As noted above, an ANC is an *Indian tribe* for the purposes of 2 CFR Parts 200 and 1500. Even though ANCs are also for-profit corporations under 2 CFR 200.101(a)(2), EPA has authority to apply 2 CFR Part 200 to grants and subawards to for-profit entities. EPA's regulations at 2 CFR Part 1500 implement 2 CFR Part 200 and apply with equal force to grants and subawards with ANCs.

### **Subawards**

Q. 1. Can ANVs and other recipients or subrecipients of EPA funds provide subawards to ANCs without following competitive procedures?

Yes, unless the policy of the EPA grant program or the ANVs own policies require competition for subawards. Reproduced below is the relevant coverage from section 10.0 of the EPA Subaward Policy. [https://www.epa.gov/sites/default/files/2020-11/documents/gpi-16-01-subaward-policy\\_attachments.pdf](https://www.epa.gov/sites/default/files/2020-11/documents/gpi-16-01-subaward-policy_attachments.pdf)

Unlike contracts subject to the Procurement Standards of 2 CFR Part 200, the applicable regulations do not require that pass-through entities select subrecipients competitively. Program Offices, however, may require that pass-through entities conduct competitions for subawards unless otherwise prohibited by statute, regulation or official EPA policy. Similarly, pass-through entities may choose to select subrecipients competitively provided this practice is consistent with applicable statutes, regulations and the terms of their EPA financial assistance agreement.

One example of an EPA grant program that requires that pass-through entities select subrecipients competitively is the Office of Environmental Justice and External Civil Rights "Grantmaker" program authorized by section 138 of the Clean Air Act.

Note that the personal and financial conflict of interest requirements in EPA's Financial Assistance Conflict of Interest Policy (but not the organizational COI policies) are still applicable to EPA funded transactions with ANCs. That policy is available at this link: <https://www.epa.gov/grants/epas-final-financial-assistance-conflict-interest-policy>

Q. 2 Can ANVs and other tribal recipients and subrecipients of EPA grant funds procure services or products from ANCs or their wholly owned subsidiaries under terms that allow the contractors to earn a profit?

Yes, as long as the recipient or subrecipient complies with the full and open competition requirements in 2 CFR Parts 200 and 1500 as interpreted in the *Best Practice Guide for Procuring Services, Supplies, and Equipment Under EPA Assistance Agreements* available at

<https://www.epa.gov/grants/best-practice-guide-procuring-services-supplies-and-equipment-under-epa-assistance>

Alaska Native Corporations being for-profit entities are potential procurement contractors (hence their 8(a) status) to perform grants awarded to Alaskan tribes that are members of the corporation. Although those relationships pose a potential organizational conflict of interest, 2 CFR 200.318(c)(1) contains an exception to the organizational COI provisions:

If the [grant or subgrant recipient] has a parent, affiliate, or subsidiary organization that is not a State, local government, or Indian tribe, the non-Federal entity must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

Q. 3. Can ANVs and other Alaskan tribal entities enter into a subaward agreement with an ANC that amounts to a 100% pass-through of EPA funds?

Yes, provided the ANV manages the subaward as an arms-length transaction (2 CFR 200.404(b)) that is not impacted by personal conflicts of interest described in the above cited EPA's Financial Assistance Conflict of Interest Policy. For example, the direct grant recipient must have internal controls (2 CFR 200.303) that preclude the ANC from approving its own invoices or other payment requests for EPA funds and manage the ANC's performance to the subaward with personnel who are not affiliated with the ANC. Note also that the prohibition on ANVs profiting from EPA subawards applies.

## **Procurement**

Q. 1. Can ANVs and other tribal recipients and subrecipients of EPA grant funds procure services or products from ANCs or their wholly owned subsidiaries under terms that preclude the contractor from earning a profit?

Yes, as long as the recipient or subrecipient complies with the full and open competition requirements in 2 CFR Parts 200 and 1500 as interpreted in the *Best Practice Guide for Procuring Services, Supplies, and Equipment Under EPA Assistance Agreements* available at <https://www.epa.gov/grants/best-practice-guide-procuring-services-supplies-and-equipment-under-epa-assistance>

Alaska Native Corporations being for-profit entities are potential procurement contractors (hence their 8(a) status) to perform grants awarded to Alaskan tribes that are members of the corporation. Although those relationships pose a potential organizational conflict of interest, 2 CFR 200.318(c)(1) contains an exception to the organizational COI provisions for Indian tribes:

If the [grant or subgrant recipient] has a parent, affiliate, or subsidiary organization that is not a State, local government, or Indian tribe, the non-Federal entity must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

Q. 2. In situations in which a federally recognized tribal government in Alaska contracts its core management functions (Tribal Administrator, Financial Manager, Environmental Coordinator) with a for-profit corporation, is it legally possible for a Tribe under these circumstances to receive an EPA grant?

There is no general legal prohibition on grants in which the recipient essentially contracts out all of the performance to a for-profit firm. However, the contract needs to be awarded competitively, arrangements have to be free from personal conflicts of interest, and the recipient's leadership has to independently manage the contract. The contractor cannot approve its own invoices for payment. Typically, organizational conflicts of interest are a concern as well, but 2 CFR 200.318(c)(2) does not apply to relationships between Tribes and affiliated companies.

Q. 3. Can ANVs or ANC's contract with wholly owned subsidiaries of ANC's on a sole source basis due to the subsidiaries status as Indian-owned economic enterprises?

No. Under the Indian Self-Determination and Education and Assistance Act, as amended, 25 U.S.C 450-458ddd-2, tribal recipients may give preference to Indian organizations and to Indian-owned economic enterprises when awarding procurement contracts under EPA assistance agreements. EPA does not interpret the ISDEAA to, in and of itself, authorize sole source procurements with Indian organizations and Indian-owned economic enterprises.

Tribes can limit competition for EPA funded contracts to Indian organizations and Indian-owned economic enterprises but cannot make sole source awards to those organizations based on their status as Indian organizations and Indian-owned economic enterprises. However, tribal recipients may give preference to these entities when developing lists for soliciting bids and proposals. If an ANC's wholly owned for-profit subsidiary is the most cost effective source for a service or product then that firm should win the competition.

Q. If an ANC has an existing long-term contract with a wholly owned subsidiary or another firm for management, information technology or similar services necessary for organizational operations, can the ANC direct charge the costs for that contract to an EPA grant or subaward?

It depends.

If the long-term contract was awarded using competitive procedures that comply with the 2 CFR Parts 200 and 1500 Procurement Standards, and the scope of that contract cover the services the ANC needs to perform the EPA funded agreement, then the direct charging would be compliant with the regulations. EPA's Best Practice Guide for Procuring Services, Supplies, and Equipment Under EPA Assistance Agreements advises recipients/subrecipients to consider using long-term contracts with performance periods of up to 5 years for efficiency. Note, however, that all of the costs for the long-term contract are included in the base for calculating the ANCs indirect cost rate the those same costs cannot be charged as direct costs to an EPA grant or subaward. Recipients must charge costs directly or indirectly as provided in 2 CFR 200.403(d). Also, even if the costs for the contract can be charged directly to the EPA grant or subaward the recipient must allocate the direct charges in compliance with 2 CFR 200.405(a) to ensure that the direct charges reflect an equitable distribution of direct charges to the EPA grant or subaward and other activities supported by the contract.

If the long-term contract was not awarded competitively, the ANC needs to conduct a competition to ensure that the costs that would be directly charged to the EPA grant are subaward are consistent with market prices. That competition must comply with regulatory requirements for full and open competition.

Q. 5. Is it possible that the rules on tribal recipient or subrecipient procurements will change?

Yes. On October 5, 2023, the Office of Management and Budget proposed to revise the Procurement Standards in 2 CFR Part 200 to make 2 CFR 200.317 apply to both states and Indian tribes. Under 2 CFR 200.317, Federal awarding agencies defer to a State “ . . . must follow the same policies and procedures it uses for procurements from its non-Federal funds” with exceptions not relevant here. Based on this regulation, EPA defers to states on decisions regarding whether and how to compete contracts financed with EPA grant funds.

It is not clear when the revised regulations will become effective (perhaps as early as April 2024) but once the change is made EPA will be able to defer to the ANC and other Alaskan tribal entities procurement policies for competition for contracts. Until the regulations are revised, procurement practices need to align with the full and open competition requirements in 2 CFR 200.319. Personal conflicts of interest in the award or administration of the contract must be mitigated, neutralized, or eliminated as required by 2 CFR 200.318(c)(1).

Note that even if the procurement rules are revised, the requirement in 2 CFR 200.404(b) that costs for contracts be incurred through arms-length transactions will remain in effect. Individuals with personal or financial conflicts of interest in transactions with a firm should not select or administer contracts with that firm.

Q. 6. Can personnel be employed by ANC subsidiaries also work as employees for ANCs or other Alaskan tribal entities and be compensated with EPA funds?

Yes. Some ANC's have listed ANC subsidiary staff as personnel in the workplan/budget narrative. In order to list these staff as personnel of the recipient and pay ANC subsidiary personnel directly (under the personnel budget category) instead of contracting with the subsidiary, the ANC must be the employer of subsidiary personnel for Federal tax purposes. In simple terms, if the ANC issues W-2s to subsidiary personnel then the ANC would be the employer and could pay subsidiary personnel with grant funds. However, as long as the compensation for the ANC employees meets the requirements in 2 CFR 200.430 and 2 CFR 200.431 the costs are allowable.

Q. 6. Can ANC's conduct procurements on behalf of ANV's or other Alaskan tribal entities?

Yes. There are provisions in 2 CFR 200.318(e) for intergovernmental agreements and inter-entity agreements for "...procurement or use of common or shared goods and services. Competition requirements will be met with documented procurement actions using strategic sourcing, shared services, and other similar procurement arrangements." This provision allows recipients and subrecipients to obtain services and products cost effectively through efficient competitions (including for long-term service contracts that cover multiple grants or subawards) and achieve economies of scale in pricing. However, the provisions in 2 CFR 200.417 governing "...services provided by one agency to another within the governmental unit..." do not apply to transactions between ANC's and their subsidiaries.

## **Brownfields**

Q. 1. Can an Alaska Native Corporation transfer land to its subsidiary and then the ANC still apply for a Brownfields cleanup grant or subgrant and then use the funds on lands that it no longer owns (the land would now be owned by its wholly-owned subsidiary)?

No. The statute (42 U.S.C. 9604(k)(3)(A)(ii)) requires that the Brownfields site be owned by the eligible entity or organization that receives the grant. That same requirement applies as a matter of program policy (through terms and conditions) to Brownfields Revolving Loan Fund capitalization grants. Transfers of real property to a for-profit wholly owned subsidiary are not among the alternative ownership arrangements EPA has recognized. Additionally, there may be issues concerning whether there is an affiliate relationship for the purposes of determining whether the Alaskan Native Corporation's wholly owned subsidiary is potentially liable for contamination at the site for the purposes of eligibility under 42 U.S.C. 4604(k)(5)(B)(iii).